BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
11-28-07
04:59 PM

Order Instituting Rulemaking into the Review of the California High Cost Fund B Program.	Rulemaking 06-06-028 (Filed June 29, 2006)

REPLY COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE TELECOMMUNICATIONS COMPANIES ON ASSIGNED COMMISSIONER'S RULING ON ISSUES RELATING TO THE SCOPING AND SCHEDULING OF PHASE II ISSUES

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 1500
San Francisco, CA 94111
Phone: (925) 465-4396
Facsimile: (877) 517-1404
Email: deyoung@caltel.org

Anita Taff-Rice
1547 Palos Verdes, #298
Walnut Creek, CA 94597
Phone: (415) 699-7885
Facsimile: (925) 274-0988
Email: anitataffrice@earthlink.net
Counsel for CALTEL

November 28, 2007

The California Association of Competitive Telephone Companies ("CALTEL"), on behalf of its members[1], hereby submits its Reply Comments on the Assigned Commissioner's Ruling on Issues Relating to the Scoping and Scheduling of Phase II Issues (Ruling) dated October 5, 2007.

I. INTRODUCTION

CALTEL sought, and was recently granted, party status in this proceeding[2] because it was concerned that AT&T and Verizon might attempt to expand the effect of updates to the cost proxy HM5.3 Model anticipated in this proceeding to future modifications of UNE rates. After reviewing AT&T's opening comments, however, CALTEL has identified an equally troubling new issue raised by AT&T that is unrelated to the cost model updates. CALTEL is extremely concerned AT&T California is attempting to misuse this proceeding to obliterate broad regulatory obligations far beyond the subject matter of this proceeding. AT&T proposes in its opening comments that the Commission and its competitors be forced to assist AT&T in removing a broad range of regulatory obligations under Sections 251 and 271 of the Telecommunications Act if AT&T is not the winning bidder in a CHCF-B service area. Such proposal bears no logical or legal relationship to the Commission's efforts to revise its CHCF-B funding program. Even if the proposal were reasonably related to the subject matter of this proceeding, it should be rejected because it is factually incorrect and contrary to state and federal law.

---

[1] CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. CALTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. The majority of CALTEL members are small businesses who help to fuel the California economy through technological innovation, new services, affordable prices and customer choice.

[2] Administrative Law Judge's Ruling Granting Motion to Intervene by California Association of Competitive Telecommunications Companies, Nov. 15, 2007.

II. AT&T'S EFFORT TO ELIMINATE BROAD REGULATORY OBLIGATIONS HAS NO REASONABLE RELATION TO THE ISSUES IN THIS PROCEEDING

AT&T argues in its opening comments that if it is not selected as the winning bidder to receive subsidies as the carrier of last resort ("COLR") for a particular area, it should not have to allow the winning bidder to use AT&T's facilities to provide service in that area.[3] AT&T apparently seeks to withdraw its facilities without regard to whether it has an obligation to continue providing facilities to the winning bidder, such as through an Interconnection Agreement (ICA), commercial contract or tariff. Instead AT&T makes an assumption that it has no obligation, and then argues that requiring AT&T to make its facilities available to a winning COLR would create a "new" requirement that is beyond the jurisdiction of the Commission.[4]

AT&T then makes an astonishing logical leap and argues that the mere presence of other carriers willing to bid (regardless of whether they win) as the COLR in a service area is evidence of a sufficient level of competition to justify removing a broad range of unrelated pro-competition obligations set forth Sections 251 and 271 of the Telecommunications Act.[5] Finally, AT&T seeks to have the Commission force a winning COLR to support AT&T's effort to eliminate its Section 251 and 271 obligations.[6] As discussed in detail below, AT&T's effort to eliminate its legal obligations are improper, unjustified and must be rejected.

A. Continued Availability of AT&T's Facilities Does Not Create A New Regulatory Obligation

It is beyond dispute that AT&T has facilities in place in high-cost service areas for which it is currently the COLR. It is also beyond dispute that those facilities are used not only to

---

[3] Phase II Comments of AT&T California (U 1001 C); AT&T Advanced Solutions, Inc. (U 6346 C); AT&T Communications of California (U 5002 C); TCG San Francisco (U 5454 C); TCG Los Angeles, Inc. (U 5462 C); TCG San Diego (U 5389 C); and AT&T Mobility LLC (New Cingular Wireless PCS, LLC (U 3060 C); Cagal Cellular Communications (U 3021 C); Santa Barbara Cellular Systems Ltd. (U 3015 C); and Visalia Cellular Telephone Company (U 3014 C), Nov. 9, 2007, at p. 16-19 [cited hereinafter as "AT&T Opening Comments"].

[4] *See e.g.*, AT&T Opening Comments, at p. 16.

[5] AT&T Opening Comments, at p. 19.

[6] It is unclear why AT&T requires the mandated assistance of the Commission or CLECs to have its regulatory obligations removed, if in fact, AT&T's legal position is as clear and compelling as AT&T posits in its Opening Comments.

provide the basic residential telephone service to which CHCF-B subsidies apply, but also a range of other services including public safety/E911, wholesale, resale, long distance, backhaul transport, Internet access, etc. Leaving these facilities in place does *not* constitute a new requirement. Rather the opposite is true; withdrawal of facilities would require AT&T to eliminate *existing* obligations.

In its Opening Comments, AT&T does not explain how it might accomplish withdrawal of its facilities in the wake of a losing COLR bid. There are, however, three logical scenarios and in order to proceed under any one of them, AT&T would have to eliminate existing legal obligations that require AT&T to leave in place its facilities.

1. Withdrawal of facilities for the winning COLR only

AT&T might attempt to withdraw facilities only for the winning COLR in a service area. If the winning COLR is purchasing facilities or services pursuant to an existing ICA or commercial agreement, however, AT&T would have to obtain an order from the Commission to extinguish those contractual obligations. Although AT&T argues that continuing to provide facilities to a winning COLR is purely a matter of federal law, AT&T is incorrect. The Commission has express, primary authority to approve, oversee and resolve disputes arising from ICAs pursuant to Section 252 (e) of the Telecommunications Act.[7] It is difficult to imagine how AT&T could convince the Commission that losing the CHCF-B subsidy in a service area is grounds to void an ICA with the winning COLR.

AT&T states in its Opening Comments that carriers competing to operate as the COLR should bid based on their costs of meeting the requirements.[8] CALTEL agrees, but there is no legal or rational basis to claim that a winning COLR should be precluded from winning a bid

---

7 *See also*, ALJ Resolution-181.

8 AT&T Opening Comments, at p. 18.

based on its network costs using facilities obtained through an ICA or commercial agreement from another carrier. In essence, AT&T is arguing that should be required to provide wholesale services only so long as the wholesale customer does not use those services to compete successfully against AT&T on a bid. Nothing could be more anti-competitive.[9] Yet that is precisely what AT&T urges. It should be noted that a winning COLR's desire to continue using AT&T's facilities would likely be driven by more than cost. Unlike ILECs, other carriers must undergo an environmental review process at the Commission, and may encounter difficulties obtaining access to municipal or utility rights of way and infrastructure, all of which may prevent the carrier from being able to build its own outside plant facilities in a timely manner.[10]

If the winning COLR does not currently have an ICA or commercial agreement, AT&T would have an obligation under Sections 251 and 271 to provide facilities to the winning COLR through an ICA or commercial agreement. AT&T admits it could not deny the winning COLR access to its facilities without eliminating these legal obligations since it is seeking Commission assistance in forcing the winning COLR to support an AT&T effort to eliminate its Section 251 and 271 obligations. [11]

Further, AT&T is required under state and federal law not to discriminate against competitors, as it would undoubtedly do if it withdrew facilities only for the winning COLR. AT&T would have, and presumably would exercise, the right to continue using its facilities to provide the same basic residential services that the winning COLR would be precluded from

---

[9] CALTEL notes that this scenario would likely violate antitrust laws since AT&T could simply withhold its facilities to drive out the winning COLR from the market, and then use its own facilities to take over the position as the COLR receiving CHCF-B subsidies.

[10] Environmental review for ILECs and CLECs varies substantially. ILECs such as AT&T are allowed to construct outside plant without any environmental review from the Commission, while CLECs are all subject to some level of environmental review at the Commission. This review process can take many months. The Commission has acknowledged that there are "unfair disparities among telecommunications providers created by the Commission's present CEQA [California Environmental Quality Act] processes." Assigned Commissioner's Ruling Requesting Comments, R.00-02-003, Apr. 26, 2006, at p. 1 ["2006 ACR"]; s*ee also* D.06-01-044, *Order Modifying Decision (D.)05-07-042 and Denying Rehearing of D.05-07-042 As Modified, p.5, January 26, 2006.*

[11] AT&T Opening Comments, at p. 19.

providing on those same facilities. AT&T would discriminate against the winning COLR, based only on the carrier's identity, by denying access to certain network facilities that it makes available to itself for basic residential service. Further, the COLR might be using, or wish to begin using, AT&T's facilities to provide non-CHCF-B services. If AT&T denied the winning COLR access to its facilities for services other than CHCF-B services, the discrimination would be even broader since other carriers and AT&T would be free to use AT&T facilities to provide the same set of non-CHCF-B services. Thus, in order to withdraw facilities from the winning COLR for some or all services in a high cost area, AT&T would either have to violate, or seek to modify state and federal anti-discrimination laws[12] such that receipt of the CHCF-B subsidy is an allowable basis to discriminate against a carrier.

The Commission has ample authority to enforce compliance with anti-discrimination laws. The Telecommunications Act expressly reserves such authority to the states by stating: "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."[13]

2. Withdrawal of facilities for all wholesale customers

Rather than attempt to single out the winning COLR for denial of facilities, AT&T might seek to withdraw facilities for all wholesale customers in the area for which it is no longer the COLR. As discussed above, this would require the removal of AT&T's existing contractual obligations and removal of AT&T's Section 251 and 271 obligations. CALTEL can think of no

[12] See e.g., Article 1, Section 7a of the California Constitution ("A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws"); PU Code Section 453(a) ("No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."); PU Code Section 709.2(c) (requires that the Commission ensure "all competitors have fair, non-discriminatory, and mutually open access to exchanges," and that "there is no substantial possibility of harm to the competitive intrastate interexchange.");ALJ Resolution-181, 4.1.4; 47 U.S.C. §202; 47 U.S.C. §251.

[13] 47 U.S.C. § 252(e)(3).

legal basis on which a court or agency could remove all of AT&T's wholesale contractual obligations merely because AT&T no longer receives subsidies as the COLR in a service area. Further, withdrawal of facilities for all wholesale customers would not alleviate the discrimination discussed above since AT&T presumably would still continue to use its facilities to provide services that competitors can no longer provide using AT&T facilities.

3. Withdrawal of all facilities

AT&T could exit the market entirely in order to deny access to its facilities to any carrier in a service area with a new winning COLR bidder. In order to exit the market entirely, and potentially leave residential customers without service, AT&T would have to file an application and obtain Commission approval.[14] AT&T would also have to obtain approval from the Commission if it intended to dispose of its utility assets.[15] Thus, continuing to provide facilities and services is an existing, not a new, obligation of AT&T and one well within the acknowledged authority of the Commission.

B. AT&T Is Attempting To Eliminate A Broad Range of Legal Obligations Unrelated to CHCF-B Subsidies

AT&T claims in its Opening Comments that it should be allowed to eliminate its Section 251 and/or Section 271 obligations if it is not selected as the winning COLR bidder. These obligations, however, set forth a broad range of pro-competition requirements far in excess of, and in some instances completely unrelated to, AT&T's provision of service in high cost areas in California. For example, Section 251 sets forth basic non-discrimination and good faith dealing requirements such as: the duty to interconnect [Section 251(a)(1)]; number portability [251(b)(2)]; dialing parity duty to interconnect [251(b)(3)]; access to rights of way [251(b)(4)]; duty to negotiate ICAs in good faith [251(c)(1)]; and duty not to install features, functions or

[14] D.07-09-017, App. A, Rule 8.5.
[15] California Public Utilities Code Section 851.

capabilities that do not comply with rules for access to telecommunications by those with disabilities and non-discriminatory interconnectivity [251(a)(2)]. Section 271 reinforces ILECs' obligations to carry out its Section 251 obligations.

It would clearly violate the public interest to relieve AT&T of a broad range of its most fundamental pro-competitive obligations merely because it is no longer received subsidies in certain high cost fund areas in California. AT&T's request must be denied.

C. Any Effort By The Commission To Compel Advocacy For AT&T Would Violate the First Amendment

AT&T asks the CPUC to "require" auction winners to "support being treated like an ILEC" and to "support a non-winning ILEC's petition for forebearance from Sections 251/271 in the auction area".[16] Such government compelled speech would clearly violate the Constitutional rights of the COLR. The First Amendment of the U.S. Constitution forbids Congress from passing any laws that abridge free speech. It is well established that the First Amendment bar on abridgement of speech: 1) applies equally to state governments as to the federal government,[17] 2) applies to corporations,[18] and 3) is not diminished simply because a corporation is a utility certified by the state.[19]

A corporation's First Amendment rights may be abridged either through suppressed or compelled speech. A government order that forced a COLR to speak in support of an AT&T forebearance petition (or a transfer of Section 251/271 obligations to itself) rather than to remain silent violates the First Amendment.[20] It would be a further violation of a COLR's First Amendment rights to have to expend funds (as it certainly would) on speech with which it did

---

16 AT&T Opening Comments, at p. 19.

17 *See e.g., Edwards v. South Carolina*, 372 U.S. 229 (1963); *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1939).

18 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), on remand 937 F.2d 608 (1990).

19 *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1 (1986), rehearing denied 475 U.S. 1133 (1986).

20 *Axson-Flynn v. Johnson*, 356 F.3d 1277 (2004).

not agree.[21] Forcing a COLR to speak in support of any AT&T petition regarding Section 251 or Section 271 obligations would clearly violate the COLR's Constitutional rights, and thus is beyond the authority of the Commission.

Setting aside the fact that forcing a COLR to support an AT&T petition on Sections 251/271 would violate its Constitutional rights, AT&T's appeal for compelled speech is completely unworkable. What if AT&T claimed that the COLR's support was too anemic? What process or criteria could the Commission use to determine if the COLR's support was sufficient? What penalty could the Commission impose on a COLR for failure to speak in support of AT&T's petition strongly enough? How many times, and in how many venues might the COLR for forced to speak in support of AT&T? Clearly, AT&T's proposal to enlist the Commission in compelling speech is illegal and unworkable, and must be rejected.

Amazingly, this is not the first time that AT&T has attempted to extract concessions from competitors in return for fulfilling its legal obligations. In 2001, Pacific Bell attempted to require several CLECs to support SBC's efforts to have Section 271 in-region line of business restrictions lifted by the FCC in exchange for offering ICA amendment concessions to those CLECs. The Commission wisely rejected Pacific Bell's effort to compel support for unrelated regulatory initiatives through use of its control over network facilities needed by those carriers.

The Commission stated:

> We share ORA's concerns with this requirement for compulsory support and silence. We believe this requirement will prevent competitors from effectively being able to accept the terms of the Agreement. Moreover, for those carriers…that are compelled to accept this requirement, we believe it causes an adverse impact on the public interest. Our pending Section 271 proceeding depends on a complete and robust record to allow us to render an accurate decision on whether Pacific has successfully met the Section 271 checklist requirements. If carriers are limited from raising issues,

[21] *Cochran v. Veneman*, 359 F.3d 263 (2004), vacated and remanded on other grounds, 544 U.S. 1058 (2005).

> our determination process is inappropriately constrained. We find merit in ORA's protest and we believe a requirement to provide support for Pacific/SBC's 271 application is not consistent with the public interest.[22]

Clearly an effort to compel a winning COLR to support AT&T's advocacy either to remove Section 251/271 obligations from itself, or to impose them on the COLR, violates the First Amendment and is therefore inconsistent with the public interest and beyond the Commission's authority. AT&T's proposal must be rejected.

III. CONCLUSION

For the foregoing reasons, CALTEL requests that the Commission reject AT&T's effort to include as an issue in this proceeding the removal of its legal obligations arising under Section 251 or Section 271 of the Telecommunications Act it AT&T fails to win a bid as the COLR in a CHCF-B service area.

Dated: November 28, 2007

Respectfully submitted,

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 1500
San Francisco, CA 94111
Phone: (925) 465-4396
Facsimile: (877) 517-1404
Email: deyoung@caltel.org

/s/Anita Taff-Rice
1547 Palos Verdes, #298
Walnut Creek, CA 94597
Phone: (415) 699-7885
Facsimile: (925) 274-0988
Email: anitataffrice@earthlink.net
Counsel for CALTEL

[22] Resolution T-16522, Oct. 25, 2001, at p. 6.